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See Dissenting Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DIAZ RAMOS, Defendant and Appellant.	E064842 (Super.Ct.No. FBA008871) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight III, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland, Samantha L. Begovich, and Allison Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

On January 17, 2006, defendant and appellant, Robert Diaz Ramos, pled guilty to the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 1) and to evading an officer (Veh. Code, § 2800.2, subd. (a), count 2). Defendant was sentenced to state prison for 16 months. In November 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which allows certain defendants convicted of specified theft- or drug-related felonies to petition to have those convictions treated as misdemeanors. On October 14, 2015, after he had served his sentence, defendant filed a petition for resentencing, requesting that his count 1 conviction for unlawful driving or taking of a vehicle be redesignated as a misdemeanor. The trial court denied defendant's petition.

On this appeal, defendant contends that, under Proposition 47, Penal Code sections 490.2 and 1170.18, and the equal protection clause, his conviction for violating Vehicle Code section 10851 must be redesignated as a misdemeanor. We reject defendant's contention and affirm the order.

I. PROCEDURAL BACKGROUND

On November 1, 2005, a felony complaint charged defendant with the unlawful driving or taking of a 1988 Nissan Sentra (Veh. Code, § 10851, subd. (a), count 1) and evading an officer while operating a motor vehicle (Veh. Code, § 2800.2, subd. (a), count 2). The People also alleged defendant had a prison prior based on a 2005 conviction for attempted stalking. (Pen. Code, §§ 664, 646.9, subd. (b), 667.5, subd. (b).)

On January 17, 2006, defendant entered into a plea agreement and pled guilty to both counts 1 and 2. As a term of the plea, defendant's prison prior allegation was dismissed. The trial court sentenced defendant to state prison for 16 months on count 1, a concurrent 16-month sentence on count 2, and awarded defendant 121 days of custody credits (81 actual days, plus 40 conduct days). Defendant alleges he completed his sentence.

On October 14, 2015, defendant petitioned the trial court to redesignate his count 1 conviction for the unlawful driving or taking of the 1988 Nissan Sentra as a misdemeanor. (Pen. Code, § 1170.18, subd. (f).) The People opposed defendant's petition on the ground that "VC 10851 is not affected by Prop. 47." The trial court denied defendant's petition, stating in its order that Vehicle Code section 10851, subdivision (a), is "[n]ot a qualifying crime." The minute order states that defendant "does not satisfy the criteria in Penal Code [section] 1170.18 and is not eligible for resentencing."

II. DISCUSSION

A. *Standard of Review*

In interpreting a voter initiative such as Proposition 47, "we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] When the language is ambiguous, 'we refer to other

indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Marks* (2015) 243 Cal.App.4th 331, 334.)

B. *Overview of Proposition 47 and Penal Code Section 1170.18*

On November 4, 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a); *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, Penal Code sections 490.2 and 1170.18. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)

Under Penal Code section 1170.18, subdivision (f): "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (Pen. Code, § 1170.18, subd. (f); *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1329.) Under Penal Code section 490.2, subdivision (a): "Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."

C. *Applicability of Proposition 47 to Vehicle Code Section 10851 Offenses*

Penal Code section 1170.18, subdivision (a), lists the offenses for which relief may be appropriate: "Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code." Vehicle Code section 10851 is not one of the listed offenses. Defendant nonetheless contends that because Vehicle Code section 10851 is a theft offense, and Penal Code section 1170.18 explicitly applies to theft offenses through Penal Code section 490.2 when the value of the stolen property is less than $950, Penal Code section 1170.18 must also apply to violations of Vehicle Code section 10851.

The California Supreme Court is currently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft (Pen. Code, §§ 490.2, 1170.18), and whether the defendant may be resentenced on a Vehicle Code section 10851, subdivision (a), conviction as if convicted of misdemeanor petty theft.[1] More recently, in *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041,[2] the Third District held that a felony conviction for violating Vehicle Code section 10851 subdivision (a), does not come within the ambit of Penal Code section 1170.18 and is ineligible for misdemeanor

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[1] E.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793, *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250, *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344, and *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150.

[2] California Rules of Court, rules 8.1105 and 8.1115.

resentencing or misdemeanor redesignation under Proposition 47, regardless of the facts of the crime or the value of the vehicle involved. (Accord, *People v. Sauceda* (Sept. 23, 2016, F071531) ___ Cal.App.5th ___ [2016 Cal.App. Lexis 792 [pp. *10-*13].) Until the California Supreme Court rules on the issue, we adhere to the view that no felony conviction for violating Vehicle Code section 10851 can be reduced to misdemeanor petty theft or qualify for resentencing as misdemeanor petty theft under Penal Code section 1170.18.

As a matter of statutory interpretation, all Vehicle Code section 10851 convictions, including both theft- and nontheft-based convictions, are ineligible for reduction in accordance with section 8 of Proposition 47. (See Voter Information Guide, Gen. Elec. [Nov. 4, 2014] text of Prop. 47, § 8, p. 72 [adding Pen. Code, § 490.2] <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf> [as of Sept. 29, 2016].) As noted, Penal Code section 1170.18 does not include Vehicle Code section 10851 as one of the enumerated offenses eligible for resentencing. Penal Code section 490.2, added by Proposition 47, also does not mention that Vehicle Code section 10851 is eligible to the limited extent a Vehicle Code section 10851 offense might qualify as a petty theft under Penal Code section 490.2. Furthermore, Vehicle Code section 10851 is not strictly a theft statute. It applies to thefts, as well as to nontheft offenses, such as driving someone's car without consent and without the intent to permanently deprive the owner of the car. (Veh. Code, § 10851, subd. (a); see also *People v. Garza* (2005) 35 Cal.4th 866, 876 [Veh. Code, § 10851, subd. (a), "'proscribes a wide range of conduct,'"

and may be violated "'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).'"].) Thus, we conclude defendant's Vehicle Code section 10851, subdivision (a), conviction is not entitled to redesignation under Proposition 47.

D. *Equal Protection*

Defendant next contends that, assuming Proposition 47 applied only to vehicle thefts but not vehicle takings, "such discrimination is impermissible under the Equal Protection Clause of the United States Constitution and the California Constitution." Not so.

Applying rational basis scrutiny, the California Supreme Court has held that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Similarly, it has long been the case that "a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) The same reasoning applies to Proposition 47's provision for resentencing/reclassification of a limited subset of those previously convicted of grand theft (those who stole an automobile or other personal property valued at $950 or less) (§ 490.2), but not for those convicted of

unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. Absent a showing that a particular defendant "'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation." (*People v. Wilkinson*, *supra*, at p. 839.) Defendant here has made no such showing.

III. DISPOSITION

The order denying defendant's Proposition 47 petition is affirmed.

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RAMIREZ
P. J.

I concur:

HOLLENHORST
J.

[*People v. Ramos*, E064842]

Slough, J., Dissenting.

I respectfully disagree with the majority opinion. I believe a defendant convicted of violating Vehicle Code section 10851, subdivision (a) (Section 10851) who establishes he was convicted of taking a vehicle valued at $950 or less with the intent to permanently deprive the owner of possession is eligible for resentencing under Penal Code section 490.2, subdivision (a) (Section 490.2).[1] The trial court concluded Section 10851 convictions are categorically ineligible, so I would reverse the trial court's order and remand for the trial court to allow the parties to supplement the evidentiary record and to make the factual findings necessary to determine whether petitioner is eligible for resentencing.

I believe the argument for the eligibility of Section 10851 theft convictions is quite simple under Supreme Court precedent and the plain text of the statute. "[A] defendant convicted under section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a *theft conviction*." (*People v.*

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[1] California appellate courts are divided on this issue, and we have not yet received guidance from the California Supreme Court. (See *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 29, 2016, S232250; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150; *People v. Orozco* (2016) 244 Cal.App.4th 65, rehg. granted Feb. 8, 2016, sub. opn. not certified for pub.; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; see also *People v. Gomez* (2016) 243 Cal.App.4th 319, rhg. granted Jan. 11, 2016, sub. opn. not certified for pub., review granted June 23, 2016, S233849; *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041.)

Garza (2005) 35 Cal.4th 866, 871, second italics added.) Under Section 490.2, a person commits petty theft by "obtaining *any* property *by theft* where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950)."[2] (Pen. Code, § 490.2, subd. (a), italics added.) A car is property, not otherwise specifically excluded from the scope of Section 490.2. (See *People v. Martin* (1921) 53 Cal.App. 671, 672 [recognizing automobiles are personal property]; cf. Pen. Code, § 487, subd. (d)(1) [defining car theft as grand theft (and a wobbler) regardless of value before Proposition 47].) So, an offender who obtains a car valued at less than $950 by theft has committed petty theft.

Further, Section 490.2 mandates any theft of property valued at less than $950 "*shall* be considered petty theft and *shall* be punished as a misdemeanor."[3] (Italics added.) Thus, the statute specifically directs prosecutors will *not* have discretion to charge a theft of low-value property, including a low-value car, as a felony. Allowing prosecutors the discretion to charge offenses that are by definition petty theft crimes as felonies under Section 10851 ignores that statutory mandate and directly contravenes the

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[2] The clause "Notwithstanding Section 487 or any other provision of law defining grand theft," at the beginning of Section 490.2 does not support a different construction. The clause is set off by a comma, which indicates it is nonrestrictive; omitting it does not alter the meaning of the remainder of the sentence. (Chicago Manual of Style (15th ed. 2003) § 6.38, p. 250.) As a result, Section 490.2's direction that "any property by theft where the value . . . does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor" means what it appears to mean on its face.

[3] The statute makes an exception for certain violent or serious recidivists.

express purpose of the statute to remove prosecutorial discretion to charge low-value car thefts as felonies. Thus, as I interpret the plain statutory text, to prosecute a Section 10851 *theft* offense after passage of Proposition 47, prosecutors must prove the value of the vehicle exceeds $950. Otherwise, they must prosecute the theft as petty theft under Section 490.2. It follows a petitioner like Ramos, if he proves he suffered a low-value car *theft* conviction, is eligible for resentencing because he would have been guilty of misdemeanor petty theft had Proposition 47 been in effect at the time he committed the offense. (Pen. Code, § 1170.18, subd. (g).)

The majority bases its contrary interpretation on the canon of interpretation holding when a statute expressly mentions one or more things in a class, the omission of other things in the class indicates the lawmaker intended their exclusion (*expressio unius est exclusio alterius*). (Maj. opn. *ante*, at p. 5.) Specifically, the majority states "Penal Code section 1170.18, subdivision (a) lists the offenses for which relief may be appropriate: 'Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code.'" (*Ibid.*) From the fact that the list omits Section 10851, the majority concludes the electorate meant to exclude it from eligible offenses. I disagree with this interpretation for two reasons.

First, canons of statutory construction are simply rules of thumb to assist in the interpretation of unclear statutory language. As such, they are discretionary and should not be used to override the plain language of the statute. (See, e.g., *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 ["When the plain meaning of the statutory text is *insufficient* to

resolve the question of its interpretation, the courts may turn to rules or maxims of construction 'which serve as *aids* in the sense that they express familiar insights about conventional language usage' "], italics added.) As I discuss above, Section 490.2 plainly applies to all thefts of property valued at $950 or less, so there is no need to appeal to the *expressio unius* rule of thumb.

Second, and more fundamental, Proposition 47 contains no list of "offenses for which relief may be appropriate." (Maj. op. *ante*, at p. 5.) Many courts have uttered this line, but I believe it is mistaken.[4] What Penal Code section 1170.18 *does* contain is a list of the sections Proposition 47 added or amended that change the *penalties* for substantive theft-related and drug possession crimes. Numerous statutory sections that set out substantive "offenses for which relief may be appropriate" do not appear in that list, including Penal Code sections 487 (grand theft), 459 (burglary), 476 (forgery, counterfeiting), 504 (embezzlement), as well as Section 10851 (vehicle theft). Thus, it is a non sequitur to say that Section 10851 does not appear in the list of new punishment provisions that appear in Penal Code section 1170.18. Section 490.2, which redefines petty theft and sets out the punishment for such crimes, *does* appear in the list of new penalties, and it is that new provision that controls all low-value car thefts.

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[4] E.g., *People v. Johnston*, *supra*, 247 Cal.App.4th at p. 257, review granted July 13, 2016, S235041 ["[S]ection 1170.18 selected only a few provisions of the Health and Safety Code and the Penal Code as offenses to designate as misdemeanors from the multitude of overlapping crimes"].

Putting the same point in the terms of the canon, Penal Code section 1170.18, subdivision (a) lists provisions setting out new misdemeanor penalties, not provisions setting out affected substantive offenses. Section 10851 sets out a substantive offense, so it does not belong to the same class of the provisions listed. Its exclusion from the list therefore implies nothing, and we cannot use the *expressio unius* canon as an aid in determining whether the electorate intended to exclude Section 10851 as an offense that is eligible for resentencing.

This point is obvious from the location of the list in the statute. It appears in subdivision (a) of Penal Code section 1170.18, which has to do with the retroactive *resentencing* of eligible offenders under new misdemeanor *sentencing* provisions. By contrast, the list does not appear in subdivision (f) of Penal Code section 1170.18—the provision at issue in this appeal—because subdivision (f) applies to offenders who have already completed their sentences and seek only redesignation and not resentencing. Subdivision (f) contains no list of eligible offenses to aid in our interpretation of the statute. (Pen. Code, § 1170.18, subd. (f) ["A person who has completed his or her sentence for a conviction . . . who would have been guilty of a misdemeanor under this act . . . may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors"].)

Unfortunately for those who want to turn to a list of eligible offenses for easy application of the initiative's redesignation and resentencing provisions, Proposition 47

contains no such list. Instead, Penal Code section 1170.18 requires courts to read any relevant provisions to discern whether a petitioner's offense of conviction must be reduced to a misdemeanor and the offender resentenced under the new and amended penalty provisions. Only after doing so will the court be equipped to follow the statutory directive to determine whether a petitioner "would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense." (Pen. Code, § 1170.18, subds. (a), (b), (f), (g).)

In this case, the record on appeal shows there is a reasonable probability Ramos will be able to establish he was convicted of taking a vehicle whose value did not exceed $950. The clerk's transcript contains a California Highway Patrol investigation report about Ramos's arrest. On October 29, 2005, Ramos took a 1988 Nissan Sentra belonging to Loretta Cummins from the parking lot at the Ontario Mills mall. The car had no radio or tape deck. Its odometer indicated it had been driven over 156,000 miles. As for whether his was a theft offense, Ramos admitted to police that he stole the vehicle and intended to drive to his wife's house. Ramos found the car in a parking lot, unlocked and with its key inside. When the owner of the vehicle learned it was stolen, she told law enforcement she had not given Ramos permission to take the vehicle and filed a stolen vehicle report with the Ontario Police Department. The report also says law enforcement stopped Ramos while he was driving the vehicle after taking it from the parking lot, which raises the factual question whether he was convicted of a Section 10851 theft or driving offense. Because the report contains hearsay statements, does not give the exact

value of the car, and does not definitively resolve whether the conviction was for taking or driving the vehicle, Ramos may have needed to supplement the highway patrol report with additional evidence. Those are factual and evidentiary matters best left to the trial court in the first instance. (See *People v. Contreras* (2015) 237 Cal.App.4th 868, 892; *People v. Fedalizo* (2016) 246 Cal.App.4th 98, 108.)

Accordingly, I would reverse the trial court's order denying Ramos's petition and remand for further proceedings. On remand, I would allow the trial court to exercise its discretion whether to allow the parties to supplement the evidentiary record and whether to hold a hearing to assist the court in making the factual findings necessary to determine whether petitioner is eligible for resentencing.

SLOUGH

J.